Supreme Court, U.S.
FILED

No. _____

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In The
Supreme Court of the United States

EDDIE MCLEAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals err in concluding that the Petitioner's rights under the 6th Amendment to the United States Constitution to either represent himself or to have his attorney of choice represent him had not been violated?

2. Did the Fourth Circuit Court of Appeals err in concluding that the sentencing enhancement in U.S.S.G. § 2K2.1(a)(2) was properly applied notwithstanding the decision in *United States v. Booker*?

3. Did the Fourth Circuit Court of Appeals err in concluding that it was proper to assign 3 criminal history points to each of the Petitioner's prior convictions for aggravated assault pursuant to U.S.S.G. § 4A1.1(a) where such convictions were the predicate convictions for enhancing the Petitioner's sentence pursuant to U.S.S.G. § 2K2.1(a)(2)?

4. Did the Fourth Circuit Court of Appeals err in not addressing the statutory error component of a *Blakely/Booker/Fanfan* claim of error, such that Petitioner is entitled to remand for imposition of a sentence under an advisory application of the guidelines?

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OPINION OF THE CASE BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is an unpublished opinion in *United States of America v. Eddie McLean*, case no. 02-4842. The decision is reported as *United States v. McLean*, 150 Fed. Appx. 249, 2005 WL 2857968 (4th Cir. 2005). A copy of the slip opinion is included in the appendix to this petition, at A-1.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed in this case is the decision of the United States Court of Appeals for the Fourth Circuit in case no. 02-4842, decided by unpublished opinion, dated October 12, 2005. *See* Appendix, at A-1.

The United States Supreme Court has jurisdiction to review this decision upon a writ of certiorari pursuant to 28 U.S.C. § 1254(1), which confers jurisdiction by writ of certiorari granted upon the petition of a party to a criminal case after rendition of a judgment in a court of appeals. This petition is filed pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States and addresses a decision of the United States Court of Appeals for the Fourth Circuit (1) in conflict with other decisions of the Fourth Circuit and of other United States courts of appeal and (2) which so far departed from the accepted and usual course of judicial proceedings, and which sanctioned such a departure by the district court, as to call for an

exercise of the supervisory power of the United States Supreme Court.

STATUTORY PROVISIONS INVOLVED

The questions presented in this case address certain United States Sentencing Guidelines sections and statutory provisions. U.S.S.G. § 4A1.1(a) assigns criminal history points for the Petitioner's two prior convictions for aggravated assault.

U.S.S.G. § 2K2.1 also applies and provides, in pertinent part, as follows:

> (a) Base Offense Level (Apply the Greatest):
>
> (1) **26**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
>
> (2) **24**, if the defendant committed any part of the instant offense subsequent sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 2K2.1.

Finally, 18 U.S.C. § 3553(b)(1) states:

(b) Application of guidelines in imposing a sentence.-

> **(1) In general.-** Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into account by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines

> applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3553(a)(1), (2) provides:

> **(a) Factors To Be Considered in Imposing a Sentence.-** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > (2) the need for the sentence imposed-
> >
> > > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> > >
> > > (B) to afford adequate deterrence to criminal conduct;
> > >
> > > (C) to protect the public from further crimes of the defendant; and
> > >
> > > (D) to provide the defendant with needed educational or vocational training, medical

> care, or other correctional treatment in the most effective manner.

The provisions of 18 U.S.C. § 3553 remain in full force and effect and are required to be considered by the court under the now advisory guidelines pursuant to *Booker*.

STATEMENT OF THE CASE

Petitioner, Eddie McLean, was charged with two (2) counts of Possession of a Firearm by a Felon in violation of 18 U.S.C. § 922(g). In the United States District Court for the Eastern District of North Carolina, a jury returned verdicts of guilty to both counts of Possession of a Firearm by a Felon. Petitioner was sentenced to an active term of imprisonment of 110 months on each count said sentences to run concurrently.

On appeal, Petitioner raised several evidentiary questions but also asserted that his sentence violated the principles set forth in *Blakely v. Washington*, 542 U.S. 296 (2004). Following the filing of his brief, the United States Supreme Court decided *Booker* effectively extending the principles of *Blakely* to the federal sentencing guidelines. The Fourth Circuit Court of Appeals rejected Petitioner's arguments by unpublished opinion filed on October 12, 2005. The Petitioner's Petition for Rehearing before the Fourth Circuit Court of Appeals was denied on November 29, 2005. *See* Appendix, at A-25.

Basis for Federal Jurisdiction in the Court of First Instance

Petitioner was charged with violations of 18 U.S.C. § 922(g). The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231, which grants original jurisdiction to the district courts of all offenses against the laws of the United States.

Facts Material to Consideration of the Question Presented

This case was tried on September 24-25, 2002 and the Defendant was sentenced on August 26, 2003. The Defendant was found guilty of two (2) counts of Possession of a Firearm by a Felon.

The trial court applied the sentencing enhancement contained in U.S.S.G. § 2K2.1(a)(2) based on the Defendant having been convicted of at least two felony convictions of a crime of violence. The trial court also assigned 3 criminal history points to each of the Defendant's convictions for aggravated assault pursuant to U.S.S.G. § 4A1.1(a) even though these same convictions were used as predicate felonies for enhancing the Defendant's sentence under U.S.S.G. § 2K2.1(a)(2). The Defendant failed to object at his sentencing hearing.

ARGUMENTS AMPLIFYING REASONS FOR WRIT

I. THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT THE PETITIONER'S RIGHTS UNDER THE 6th AMENDMENT TO THE UNITED STATES CONSTITUTION TO EITHER REPRESENT HIMSELF OR TO HAVE HIS ATTORNEY OF CHOICE REPRESENT HIM HAD NOT BEEN VIOLATED.

Petitioner, at the August 27, 2002 session of court, made an oral motion for his attorney of record, Mr. Vaughn Winborne, to be removed as his attorney of record. The trial court denied Mr. McLean's oral motion that Mr. Winborne be removed as his trial attorney.

An essential element of the 6th Amendment's protection of the right to counsel is that a defendant must be afforded a reasonable opportunity to secure counsel of his own choosing. *Powell v. Alabama*, 287 U.S. 45 (1932). The right to counsel of defendant's choosing is not absolute, *Sampley v. Attorney General of North Carolina*, 786 F.2d 610 (4th Cir. 1986), *cert. denied*, 106 S. Ct. 3305 (1986), and such right must not obstruct orderly judicial procedure and deprive courts of their inherent power to control the administration of justice. *United States v. Bragan*, 499 F.2d 1376 (4th Cir. 1974).

A defendant, likewise, has a right to represent himself without the aid of counsel if he elected to do so with knowledge of his rights and the consequences of his election. *Faretta v. California*,

422 U.S. 806 (1975); *United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978).

Petitioner related to the court the reasons he wanted Mr. Winborne removed as his attorney of record. Among the reasons cited by Petitioner include the fact that he had no notice of the August 27, 2002 trial date from his attorney, that he had no notice of the discovery-related order entered on August 14, 2002 and that he was not able to communicate with Mr. Winborne while he was in Butner following an evaluation for mental competency.

The trial court observed that the court had previously allowed Petitioner's two prior attorneys, Mr. Vallery and Mr. Long, to withdraw as Petitioner's attorneys of record at Petitioner's request. Following a lengthy colloquy between the trial court and Petitioner during which the trial court stated "I'm thinking about picking the jury, he's talking himself out of a continuance the more he talks because he's such a liar" the trial court refused to discharge Mr. Winborne but continued the case from the trial calendar.

The trial court refused to remove Mr. Winborne and permit Petitioner to either represent himself or to retain new legal counsel. This denial by the trial court was made notwithstanding the fact that the case would not be tried at the August 27, 2002 session of court and that such request by Petitioner would not have, in any way, delayed the trial of the case or adversely affected the administration of justice.

II. THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT THE SENTENCING ENHANCEMENT IN U.S.S.G. § 2K2.1(a)(2) WAS PROPERLY APPLIED NOTWITHSTANDING THE DECISION IN *UNITED STATES v. BOOKER*.

The United States Supreme Court, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that any fact, other than a prior conviction, that increases the penalty for a crime beyond a given statutory maximum must be pled in the indictment, submitted to the jury, and proved beyond a reasonable doubt. *Id.* at 490. Although not expressly overruling *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (upholding as constitutional an increase in a defendant's maximum sentence based on the sentencing court's determination, under a preponderance standard, that the defendant had a previous conviction for an aggravated felony), *Apprendi* recognized the existence of serious due process and Sixth Amendment concerns whenever a defendant's prior conviction is proved at sentencing by a preponderance of the evidence and then his sentence increased beyond the otherwise applicable statutory maximum penalty based on the prior conviction. *Id.* at 488-490.

More recently, the United States Supreme Court in *Blakely v. Washington*, 124 S. Ct. 2531 (2004) held that the defendant's 6th Amendment rights to a trial by jury had been violated by the trial judge's finding that the defendant "had acted with deliberate cruelty" thus increasing the defendant's sentence. The Supreme Court there again

emphasized that a defendant's right to a jury trial is no procedural formality but, rather, is a fundamental reservation of power in our constitutional structure. 124 S. Ct. at 2538. Of course, the decision of the United States Supreme Court in *Booker* applies the principles set forth in *Blakely* to the federal sentencing guidelines.

18 U.S.C. § 922(g)(1) and U.S.S.G. § 2K2.1(a)(2) require substantially more than proof of the fact of a prior conviction. For example, whether a prior conviction constitutes a "violent felony" is subject to consideration and debate. Such inquiries are uniquely and historically reserved for juries applying a "beyond a reasonable doubt" standard.

The 5th Amendment and 6th Amendment to the United States Constitution guarantee that a criminal defendant cannot be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury and a finding by a jury of all facts which increase his sentence beyond a reasonable doubt. To permit defendants such as Petitioner to be sentenced for an offense with which he has neither been charged or convicted by a jury permits the court to impermissibly broaden the indictment of its own accord in the sentencing phase.

III. THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT IT WAS PROPER TO ASSIGN 3 CRIMINAL HISTORY POINTS TO EACH OF THE PETITIONER'S PRIOR CONVICTIONS FOR AGGRAVATED ASSAULT PURSUANT TO U.S.S.G. § 4A1.1(a) WHERE SUCH CONVICTIONS WERE THE PREDICATE CONVICTIONS FOR ENHANCING THE PETITIONER'S SENTENCE PURSUANT TO U.S.S.G. § 2K2.1(a)(2).

Pursuant to U.S.S.G. § 4A1.1(a) the trial court assigned 3 criminal history points each for Petitioner's two prior convictions for aggravated assault both adjudicated in the state courts of Tennessee on August 14, 1997. These two convictions for aggravated assault served as the predicate felonies for the trial court finding a base offense level of 24 under Section 2K2.1(a)(2) of the United States Sentencing Guidelines.

Petitioner contends that using the two Tennessee convictions as predicate felonies for finding his base offense level to be 24 pursuant to U.S.S.G. § 2K2.1(a)(2) constitutes "double counting" and is improper. Petitioner was assigned a base level offense of 24 and was assigned 6 criminal history points for the very same convictions.

Petitioner acknowledges that his argument has been rejected by many of the federal appellate courts. *See*, *United States v. Cobleigh*, 75 F.3d 242 (6th Cir. 1996); *United States v. Chapman*, 7 F.3d 66 (5th Cir. 1993). Additionally, Petitioner acknowledges the decision in *United States v.*

Crawford, 18 F.3d 1173 (4th Cir. 1994) but asserts that such the United States Supreme Court should address this issue.

IV. THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN NOT ADDRESSING THE STATUTORY ERROR COMPONENT OF A *BLAKELY/BOOKER/FANFAN* CLAIM OF ERROR, SUCH THAT PETITIONER IS ENTITLED TO REMAND FOR IMPOSITION OF A SENTENCE UNDER AN ADVISORY APPLICATION OF THE GUIDELINES.

The decision in *Booker* recognizes constitutional error at sentencing which is premised on Sixth Amendment principles and statutory error which is based on a mandatory application, rather than an advisory application, of the federal sentencing guidelines. *See Booker*, 543 U.S. at ____, 125 S. Ct. at 768. The Fourth Circuit Court of Appeals, although addressing the constitutional issue, did not address the statutory issue which is also implicated by *Booker*.

Petitioner submits that statutory *Booker* error is structural and entitles him to a remand of his case under an advisory federal sentencing guidelines. However, should this Court hold that statutory *Booker* error is not structural, this situation is one in which the courts should presume prejudice. *See United States v. Barnett*, 398 F.3d 516 (6th Cir.), *cert. dismissed*, ___ U.S. ___, 126 S. Ct. 33 (2005).

Petitioner is entitled to be sentenced under the advisory federal guidelines as mandated by *Booker*. The Fourth Circuit's failure to consider this

statutory error has deprived Petitioner of an opportunity to argue to the district court that he should receive a sentence below the applicable guideline range.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to grant a writ of certiorari, review the decision of the United States Court of Appeals for the Fourth Circuit which affirmed the Petitioner's convictions and sentence, reverse, and remand his case for a new trial, or in the alternative, a new sentencing hearing.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-4842

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

EDDIE MCLEAN,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (CR-02-37-BO)

Submitted: August 24, 2005

Decided: October 12, 2005

Before MICHAEL, KING, and GREGORY, Circuit Judges.

Affirmed by unpublished per curiam opinion.

W. Gregory Duke, BLOUNT & DUKE, Greenville, North Carolina, for Appellant. Frank D. Whitney, United States Attorney, Anne M. Hayes, Christine Witcover Dean, Assistant United States Attorneys, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Eddie McLean was convicted by a jury of two counts of unlawful possession of a firearm by a felon, 18 U.S.C. § 922(g)(1) (2000), and was sentenced to a term of 110 months imprisonment. McLean appeals his conviction and sentence. We affirm.

At McLean's trial, the government's evidence showed that, on May 13, 2001, Fayetteville, North Carolina, Police Officer Jamison Keltner responded to a report of "shots fired" and was directed to McLean's house. Keltner testified that he found McLean standing on his front porch smelling strongly of alcohol. When Keltner asked McLean where the gun was, McLean said that he had put it on the porch. Keltner seized a 12-gauge shotgun from McLean's porch, a short distance from where McLean was standing. There were several shotgun shells lying on the porch. McLean told Keltner that he had fired the shotgun because he was tired of "drug boys" being in the street in front of his house. McLean was not arrested, although the shotgun was confiscated.

Officer Brenda Senkier testified that, on July 9, 2001, she responded to a report of shots being fired at McLean's house. When she arrived, she saw McLean standing on his porch holding a pistol. Senkier told McLean to put the gun down, but he ran inside and went to the kitchen at the back of the house. Senkier heard the sound of a drawer closing, after which McLean returned to his porch and confronted Senkier belligerently. When a backup officer arrived, he and Senkier placed McLean in a patrol car, then went into McLean's kitchen, where they found a pistol in the drawer below the oven. The pistol had recently been fired. The backup officer testified at trial, corroborating Senkier's account. The government also produced evidence that McLean had a prior felony drug conviction. McLean was convicted of both counts of being a felon in possession of a firearm.

At sentencing, the district court grouped both counts together pursuant to U.S. Sentencing Guidelines Manual § 3D1.2(d) (2002), and determined that a base offense level of 24 applied under USSG § 2K2.1(a)(2) because McLean had two prior felony convictions for aggravated assault. With eighteen criminal history points, McLean was in criminal history category VI. His guideline range was 100-120 months. McLean argued pro se that his criminal history and base offense level were incorrectly calculated; however, the district court summarily overruled his objections and imposed a sentence of 110 months imprisonment.

On appeal, McLean first challenges the district court's denial of his motion in limine, in which he sought to suppress the pistol seized from his house. The motion was filed on August 27, 2002, although the district court's pretrial scheduling order required that pretrial motions be filed by March 29, 2002. The court denied the motion on two grounds: (1) that it was an untimely motion to suppress, and (2) that a warrantless entry into McLean's house was justified by exigent circumstances. McLean concedes that the motion was untimely, but argues that the issue was preserved for appeal because the court addressed the merits of his motion. He claims that the court clearly erred in finding that exigent circumstances were present.

Suppression motions must be filed before trial. Fed. R. Crim. P. 12(b)(3)(C); United States v. Wilson, 115 F.3d 1185, 1190 (4th Cir. 1997). The district court may set a date before which pretrial motions must be filed. Fed. R. Crim. P. 12(c). A defendant's failure to make a pretrial motion before the court's deadline constitutes a waiver of the issue unless the court grants relief from the waiver for good cause. Fed. R. Crim. P. 12(e). The district court's decision to deny a suppression motion as untimely is reviewed for abuse of discretion, with consideration given to the defendant's reason for the untimely filing. United States v. Denman, 100 F.3d 399, 402 (5th Cir. 1996). McLean did not request relief from the waiver or provide any explanation for his late filing. Therefore, the district court did not abuse its

discretion in denying McLean's motion in limine seeking to suppress the pistol.*

McLean next argues that the district court refused him the right to represent himself or to obtain a new attorney of his own choosing. McLean moved to represent himself on August 27, 2002, the scheduled trial date, but he indicated that his real desire was to obtain a different lawyer. The court offered to continue the trial and discharge McLean's lawyer if he wished. McLean then relinquished his request to represent himself, stating, "If you will continue it, I'll stay with him until I see about getting another lawyer." The district court continued the trial and ruled that, "[a]ny request the defendant has made to discharge his lawyer is denied." McLean was represented at trial by his appointed counsel. He obtained a new lawyer for the sentencing hearing. He did not ask to represent himself again.

The district court's denial of a defendant's motion to represent himself is reviewed de novo. United States v. Singleton, 107 F.3d 1091, 1096-97 (4th Cir. 1997). Although a defendant has a right to represent himself, Faretta v. California, 422 U.S. 806, 819 (1975), his assertion of the right "must be (1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." United States v. Frazier-El, 204 F.3d 553, 558-59 (4th Cir. 2000)

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* We also conclude that the district court did not clearly err in finding that the officers' limited warrantless search for the pistol was justified by exigent circumstances. United States v. Cephas, 254 F.3d 488, 495 (4th Cir. 2001) (citing United States v. Turner, 650 F.2d 526, 528 (4th Cir. 1981)). The officers did not know whether there were other persons in the house who might remove or use the firearm.

(internal citations omitted). The record in this case reveals that McLean never made an unequivocal request to represent himself. On these facts, the district court did not err when it denied McLean's motion to discharge his lawyer and represent himself.

McLean contends that the evidence was insufficient to establish that he possessed either the shotgun or the pistol because the shotgun was not in his hands on May 12, 2001, when Officer Keltner arrived and because Officer Senkier did not positively identify the pistol found in McLean's kitchen as the weapon she saw in his hand when she approached his house on July 9, 2001. We review de novo the district court's decision to deny a Fed. R. Crim. P. 29 motion for acquittal. United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997). Where, as here, the motion was based on insufficient evidence, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Wills, 346 F.3d 476, 495 (4th Cir. 2003), cert. denied, 124 S. Ct. 2906 (2004). The reviewing court considers both direct and circumstantial evidence and permits "the government the benefit of all reasonable inferences from the facts proven to those sought to be established." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982). Witness credibility is within the sole province of the jury, and the appellate court does not reassess the credibility of testimony. United States v. Saunders, 886 F.2d 56, 60 (4th Cir. 1989).

Here, the government's evidence was sufficient to show that McLean actually possessed a firearm on each date charged in the indictment. Officer Keltner testified that, when he walked up to McLean's porch and asked McLean where the gun was, McLean pointed out where the shotgun was lying on the porch and said he had put it there. Keltner also testified that McLean told him he had fired the shotgun before Keltner arrived. Because the jury found Keltner's testimony credible, his testimony established that McLean possessed the shotgun on that date. Similarly, Officer Senkier testified that she observed McLean standing on his porch with a pistol in his hand. When Senkier approached the porch, McLean ran into his house toward what she knew to be the kitchen. She heard a bang, after which McLean immediately came out of the house again and said to her, "You are not getting it." Senkier and the backup officer then recovered from a drawer in the kitchen a handgun that had recently been fired. Senkier testified that the recovered gun was the same gun she saw McLean holding on the porch. This evidence was sufficient to establish that McLean possessed the seized firearm on that date.

Relying on Blakely v. Washington, 542 U.S. 296 (2004), McLean contends that the court's decision to enhance his base offense level based on his two prior convictions for crimes of violence violates the Fifth and Sixth Amendments. Because McLean did not challenge his sentence on constitutional grounds in the district court, his claim is reviewed for plain error. United States v. Olano, 507 U.S. 725, 731-32 (1993). McLean's base offense

level was set at 24 based on his two 1997 convictions for aggravated assault. McLean was arrested in January 1996 and again in July 1996; he pled guilty in each case and was sentenced to concurrent four-year terms of imprisonment on August 14, 1997. Each conviction involved an assault on a different victim, on different dates.

In United States v. Booker, 125 S. Ct. 738 (2005), the Supreme Court held that Blakely applies to the federal sentencing guidelines and that the Sixth Amendment is violated when a sentence is imposed under the mandatory guidelines scheme which is greater than the maximum authorized by the facts admitted by the defendant or found by the jury. See 125 S. Ct. at 746, 750-51. The Court remedied the constitutional violation by severing and excising the statutory provisions that mandate sentencing and appellate review under the guidelines, thus making the guidelines advisory. Id. at 756-57. Booker reaffirmed the prior conviction exception set out in Almendarez-Torres v. United States, 523 U.S. 224 (1998), and preserved in Apprendi v. New Jersey, 530 U.S. 466 (2000). See Booker, 125 S. Ct. at 756 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"). Subsequently, the Supreme Court held in Shepard v. United States, 125 S. Ct. 1254 (2005), that the same Sixth Amendment principle applies to "a disputed fact . . . about a prior conviction" that is not evident from the prior judicial record, id. at 1262, as opposed to the

mere fact of a prior conviction. See also United States v. Collins, 412 F.3d 515 (4th Cir. 2005) (finding no Sixth Amendment violation where nature and separateness of predicate offenses for career offender status was undisputed); cf. United States v. Washington, 404 F.3d 834, 843 (4th Cir. 2005) (finding that district court's reliance on disputed facts about prior conviction to determine that it was a crime of violence violated the Sixth Amendment).

McLean acknowledges the exception for "the fact of a prior conviction," upheld in Blakely, 542 U.S. at ___, 124 S. Ct. at 2536, but argues that Almendarez-Torres, 523 U.S. at 233-36, on which it is based, must now be narrowly applied and may no longer be good law. Further, McLean argues that the factual findings required to determine whether particular convictions are countable and how many points are assessed involve more than the mere fact of a prior conviction and therefore are subject to the requirements of Blakely.

This argument is foreclosed by the Supreme Court's reaffirmation of the Almendarez-Torres prior conviction exception in Booker. In this case, the district court's determination of McLean's criminal history did not violate the Sixth Amendment because the court did not consider any facts McLean had not admitted. The court relied on the record of McLean's prior convictions and sentences. As in Collins, the violent nature and separateness of McLean's prior convictions for aggravated assault were evident from the record. McLean's due process or Fifth Amendment claim also fails. See United States v. Harp, 406 F.3d 242, 247 (4th Cir. 2005) (holding that, even if the district court plainly erred in

determining that defendant was a career offender when elements of career offender status had not been charged in indictment, this court would not exercise its discretion to correct the error because Harp "had no legitimate defense to the career offender designation"). McLean similarly lacks a legitimate defense to the base offense level that was applied under § 2K2.1(a)(2).

McLean also argues that the district court plainly erred by using his two aggravated assault convictions to enhance his base offense level under § 2K2.1(a)(2) and giving him three criminal history points for the sentence in each case because this constitutes improper double counting. Because McLean did not object to his criminal history calculation on this ground in the district court, this claim is reviewed for plain error.

No error occurred because double counting is permitted under the guidelines "except where it is expressly prohibited." United States v. Crawford, 18 F.3d 1173, 1179 (4th Cir. 1994). Therefore, it is permissible to enhance a defendant's base offense level because he has certain prior felony convictions and to assess criminal history points for the sentences imposed for the same convictions. Id. at 1180. McLean concedes that his argument was rejected in Crawford, but he suggests that Crawford should be overruled. Because a panel of this court may not overrule another panel, see United States v. Chong, 285 F.3d 343, 346 (4th Cir. 2002), his claim fails.

Next, McLean contends that the district court plainly erred in not counting the sentences for his

two 1997 convictions as one prior sentence under § 4A1.2(a)(2) because they were related cases as defined in Application Note 3 to § 4A1.2. Cases are related if they occurred on the same occasion, they were part of a single common scheme or plan, or they were consolidated for trial or sentencing. However, Application Note 3 states that cases are never considered related if there was an intervening arrest, that is, the defendant was arrested for the first offense before he committed the second offense. McLean was arrested for the first aggravated assault in January 1996; he committed the second aggravated assault on a different victim in July 1996. Consequently, the district court did not err in counting the sentences imposed in these cases separately.

Finally, McLean maintains, again for the first time, that the district court erred in awarding criminal history points under § 4A1.1(a) and (c) for his prior sentences because the convictions were not charged in the indictment or found by a jury beyond a reasonable doubt. He also argues that the court plainly erred in assessing two criminal history points under § 4A1.1(e) for commission of the instant offense while on probation when his probationary status was not charged or proved to a jury. No Sixth Amendment error occurred because the court relied solely on the judicial record which established the fact of McLean's prior convictions and sentences, including his probationary sentence. All these facts come within the prior conviction exception upheld in Booker. 125 S. Ct. at 756. The court did not make fact findings to resolve any dispute about the prior convictions; all the information used to calculate

McLean's criminal history was evident from the judicial record. Shepard, 125 S. Ct. at 1262-63.

We therefore affirm the conviction and sentence imposed by the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT

Eastern District of North Carolina
Western Division

UNITED STATES OF AMERICA
v.
EDDIE MCLEAN

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)
Case Number: **5:02CR00037-001**

TERRY F. ROSE
Defendant's Attorney

THE DEFENDANT:

- ❑ pleaded guilty to count(s) _____
- ❑ pleaded nolo contendere to count(s)_____ which was accepted by the court.
- ❑ was found guilty on count(s) 1 & 2 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 922(g)(1)	Possession of a firearm by a felon	05/13/2001	1
18 U.S.C. § 922(g)(1)	Possession of a firearm by a felon	07/09/2001	2

DEFENDANT: EDDIE MCLEAN
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The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ❑ The defendant has been found not guilty on count(s) _____
- ❑ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: XXX-XX-2197
Defendant's Date of Birth: XX/XX/1950
Defendant's USM No.: 23015-056
Defendant's Residence Address:
201 Cude Street, Fayetteville, NC 28603
Defendant's Mailing Address:
201 Cude Street, Fayetteville, NC 28603
Date of imposition of Judgment: 08/26/2003

/s/ Terrence W. Boyle
Signature of Judicial Officer

TERRENCE W. BOYLE, CHIEF, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

Date: 8/26/03 Cup. dist.

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CASE NUMBER: 5:02CR00037-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 110 month(s).

Ct. 1 – BOP (110) months
Ct. 2 – BOP (110) months and shall run concurrent with Ct. 1

- ❑ The court makes the following recommendations to the Bureau of Prisons:
  Court recommends incarceration at FCI, Burner, NC

- ❑ The defendant is remanded to the custody of the United States Marshal.

- ❑ The defendant shall surrender to the United States Marshal for this district:
  - ❑ at _____ a.m./p.m. on _____
  - ❑ as notified by the United States Marshal

- ❑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - ❑ before 2 p.m. on _____
  - ❑ as notified by the United States Marshal.
  - ❑ as notified by the Probation or Pretrial Services Office.

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RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).

Ct. 1 – (3) years
Ct. 2 – (3) years and shall run concurrent with Ct. 1

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

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The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after *September 13, 1994*:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

❑ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

❑ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this Judgment.

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The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below). **See Special Conditions of Supervision**.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully ail inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;

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8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed In plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measures and may require residence or participation in a residential treatment facility.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$200.00	$	$

❑ If applicable, restitution amount ordered pursuant to plea agreement . . . . . .$ _____

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FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

- ❑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - ❑ The interest requirement is waived.
  - ❑ The interest requirement is modified as follows:

RESTITUTION

- ❑ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

- ❑ The defendant shall make restitution to the following payees in the amounts listed below.

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If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee		**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
	Totals:	$_____	$_____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13,1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. ❑ See special instructions below
B. ❑ $ _____ immediately, balance due (in accordance with C, D, or E); or
C. ❑ not later than _____; or

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D. ❑ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E. ❑ in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:
The special assessment in the sum of $200.00 shall be due immediately.

❑ The defendant shall pay the cost of prosecution.

❑ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment

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payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk, U.S. District Court, Attn: Financial Unit, Post Office Box 25670, Raleigh, NC 27611, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 29, 2005

No. 02-4842
CR-02-37-BO

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

EDDIE MCLEAN

Defendant – Appellant

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered for a panel composed of Judge Michael, Judge King, and Judge Gregory.

For the Court - By Direction

/s/ Patricia S. Connor
CLERK